United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

431

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

NO. 23, 167

UNITED STATES OF AMERICA, APPELLEE

V.

ROY D. LEWIS, APPELLANT

APPEAL FROM JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF CASES

* Cases or authorities chiefly relied upon are marked by asterisks.

* STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did the display of weapons on the counsel table of the Prosecutor prejudice the jury against Appellant?

II. Did the resistance to arrest by Appellant constitute three violations of Title 22, Section 505 (b) of the District of Columbia Code, 1967?

III. Was it proper for the Court to impose consecutive sentences in the circumstances of this case?

Reference To Rulings

None

* THIS CASE HAS NOT BEEN BEFORE THIS COURT UNDER THE SAME OR SIMILAR TITLE.

In The
United States Court of Appeals
For the District of Columbia Circuit

No. 23, 167

United States of America, Appellee
v.
Roy D. Lewis, Appellant

Appeal from Judgment of the
United States District Court
For the District of Columbia

Jurisdictional Statement

Appellant was indicted in a seven count indictment charging him with Assault with a dangerous weapon - 22 D.C. Code 502 on four counts, and with Assault on member of police force with a dangerous weapon - 22 D.C. Code 505 (b) on three counts. Appellant was tried before a Jury in the United States District Court for the District of Columbia and convicted on one count of Assault with a dangerous weapon, and on three counts of Assault on member of police force. Appellant was sentenced to four terms of two (2) years to six (6) years on each of the four counts with the sentences to run consecutively. Appellant filed a petition for leave to appeal without prepayment of costs, which petition was granted by the United States District Court on August 27, 1969. The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1294.

STATEMENT OF THE CASE

The Appellant was charged in a seven-count Indictment with (1) assault upon Joseph Whittington with a dangerous weapon, that is, a pistol (22 D.C. Code 502); (2) assault upon Otis Fickling with a dangerous weapon, that is, a pistol, knowing him to be a member of the Metropolitan Police Department operating in the District of Columbia, while the said Otis Fickling was engaged in the performance of his official duties (22 D.C. Code 505 (b)); (3) assault upon Otis Fickling with a dangerous weapon, that is, a pistol (22 D.C. Code 502); (4) assault upon Edward F. Davis with a dangerous weapon, that is, a pistol, knowing him to be a member of the Metropolitan Police Department operating in the District of Columbia, while the said Edward F. Davis was engaged in the performance of his official duties (22 D.C. Code 505 (b)); (5) assault upon Edward F. Davis with a dangerous weapon, that is, a pistol (22 D.C. Code 502); (6) assault upon Charles K. Marlak with a dangerous weapon, that is, a pistol, knowing him to be a member of the Metropolitan Police Department operating in the District of Columbia, while the said Charles K. Marlak was engaged in the performance of his official duties (22 D.C. Code 505 (b)); (7) assault upon Charles K. Marlak with a dangerous weapon, that is, a pistol (22 D.C. Code 502). A Jury Trial was held in the Court below on April 1, 2, and 3, 1969 the Honorable Chief Judge Edward M. Curran, presiding. On April 3, 1969 the Jury returned a verdict of guilty as to counts one, two, four and six. The Jury had been instructed that if defendant were found guilty on counts two, four and six, they were to disregard

counts three, five and seven. On May 16, 1969 Chief Judge Edward M. Curran sentenced Appellant to be imprisoned from two (2) years to six (6) years on counts one (1), two (2), four (4) and six (6). The aforesaid sentences to run consecutively by the count. Appellant now appeals his conviction as to counts one, two, four and six.

At the outset of the trial, after the jury had been selected but before any evidence had been introduced, there was a display of weapons on the table in front of the prosecutor. Because of this, counsel for Appellant moved for a mistrial. The motion was over-ruled, the Court making the statement that that is going to be ruled in evidence. The court also observed that the jury had seen it.[1] [Tr. 18].

It is noted that Joseph Whittington, the person Appellant is charged with having shot did not appear to testify at the trial. That he was the victim of a gunshot wound was attested to by the chief resident at Georgetown Hospital. [Tr. 25]. The bullet was not recovered. [Tr. 27].

On August 24, 1968, Appellant attended a party given by Anita Bennett [Tr. 32-34], and during the course of the party, Appellant had an argument with a boy named Stanley Mack. [Tr. 36]. Later, Joseph Whittington entered and interceded with Appellant. [Tr. 37]. There was talk of a fight between Whittington and Appellant, and Appellant warned Whittington to stay away from him. [Tr. 38]. It was when Whittington continued after Appellant that Whittington was

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[1] Refers to pages of Vol. 1 of Transcript of April 1, 1969.

shot [Tr. 38]. Whittington had taken off his shirt anticipating a fight. [Tr. 38]. The gun was identified as a small gun [Tr. 54].

Sergeant Davis, supervising official in the 11th Precinct testified that about 3:00 A. M. he received a radio call to meet with Detectives Fickling and Pettis, and thereafter went to 1402 Ridge Place S. E. [Tr. 78]. Then they went to an apartment on the second floor where they announced who they were and that they had come to arrest a Roy Lewis for A. D. W. and for him to come out. [Tr. 78]. They received no reply. [Tr. 78]. Later, someone inside the apartment said that, "I am coming out". He came out around the hallway and at this time fired one shot in the general direction of Detective Fickling [Tr. 80]. Thereafter, a shot was fired from the second floor of 1402 Ridge Place [Tr. 81]. The civil disturbance units came upon the scene, and a voice called out that he was going to give up. Thereupon, a hand weapon was thrown out of the apartment landing in the hallway. After another shot had been fired from the second floor front window, tear gas was fired into the building. The Appellant then came down [Tr. 82]. The weapon was a .25 caliber automatic pistol. Sergeant Davis, at the time of the shot from the window was on the front porch and couldn't tell who it was fired at. [Tr. 83]. After Appellant was handcuffed, Detective Pettis went up to the second floor apartment and recovered another pistol and a shotgun. [Tr. 83].

Officer Pettis was present at the time the alleged shot was fired, [Tr. 87]. However, Sergeant Davis did not know his exact position, [Tr. 87,88]. No effort was made to recover the bullet which was fired from the second floor. [Tr. 90, 91]. No ballistics

examinations were made of any of the three guns recovered. [Tr. 92]. Sergeant Davis did not know who fired the shot. [Tr. 94].

At the hearing on the Motion to Suppress testimony was taken from Officer Robert Pettis. Officer Pettis did not know who fired the shot,[2] [Tr. 28]. He heard some firing but didn't know where they were from [Tr. 29]. After tear gas was used, Appellant came out of the apartment and was arrested at the foot of the steps [Tr. 30]. There was no arrest or search warrant for Appellant but the apartment was searched and a shotgun and .38 caliber revolver was seized. The .25 caliber revolver was thrown down the steps before Appellant came out. [Tr. 31]. No ballistics tests were made on any of the three guns nor were any bullets recovered from the scene of the shooting. [Tr. 32].

Detective Fickling heard the door to the apartment open, and observed a Negro coming down the stairs as a shot was fired at him by Appellant.[3] [Tr. 14]. Appellant was within 3 or 4 feet from Fickling when shot was fired. [Tr. 15]. Shots were being fired by the police. [Tr. 16]. Shooting continued for about 25 minutes. Before Appellant came down the stairs, he threw the .25 caliber pistol down [Tr. 17]. When Detective Pettis returned from searching the apartment, he had a .38 caliber revolver and a shotgun. The revolver had one expended round and the shotgun was loaded. [Tr. 18]. After a search immediately after the occurrence and again

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[2] Numbers hereafter refer to Transcript of Feb. 28, 1968 on Motion to Suppress.

[3] Numbers hereafter refer to pages of Vol. 2 of Transcript of April 2, 3, 1969.

on the next day, Detective Fickling could not find any bullet. [Tr. 23]. At the time of the shooting he was not in uniform. [Tr. 26]. He heard shots being fired but didn't know where they were coming from. [Tr. 39, 40].

Detective Pettis testified that shots were fired by him and by other police at the second floor. [Tr. 54]. He didn't know whether any shots were fired from the apartment. [Tr. 66]. He could not say that any of the guns offered in evidence were fired on the night in question. [Tr. 69].

Officer Marlak responded to the scene of 1402 Ridge Place S.E. after a call for assistance received about 3:00 A. M. He was in a one-man scout car. As he arrived he heard a shot, and saw the police officers come down the stairs very fast and come out onto the porch. At this time he went across the street and stated that he was fired on from the 2nd floor window. He returned the fire with a sawed-off shotgun and tear gas. [Tr. 77, 78]. He stated that he was hit by a bullet that went through the back of his hat and hit the brick wall. [Tr. 79]. Numerous shots were exchanged, and he fired three tear gas pellets. [Tr. 80].

Officer Marlak, when asked whether he still had the hat stated that he had turned it in, and that it probably was in the trash somewhere. [Tr. 83, 84]. In his written report of the case, he made no mention of the fact that his hat had been nicked by a bullet. [Tr. 96].

Officer Marlak claimed to have found an empty casing at the scene of the shooting in the vicinity of the apartment. [Tr. 84]. This

was a .25 caliber shell recovered in the hallway at 1402 Ridge Place. [Tr. 94, 95]. However, in his written report, no mention was made of the finding of this shell. [Tr. 96]. It appears that his written report differs from his testimony at the trial [Tr. 97].

Mr. Ronald Sherman Green testified on behalf of Appellant. [Tr. 108]. He attended the same party as Appellant and Whittington. He stated that the argument was not between Whittington and Appellant, but between Whittington and another young man whom he did not know. [Tr. 109, 110]. The Appellant approached Whittington and asked what the trouble was. Appellant then stated that as he was on parole, he was going to leave as he couldn't risk any kind of trouble. Green then stated that he saw the young man pull a gun out, and saw Whittington fall. [Tr. 111]. At the time Whittington was shot, Appellant had left. [Tr. 118].

ARGUMENT

I. DID THE DISPLAY OF WEAPONS ON THE COUNSEL TABLE OF THE PROSECUTOR PREJUDICE THE JURY AGAINST APPELLANT?

In Berger v. United States, 295 U.S. 78, 55 S. Ct. 629 the court said that a prosecutor's duty is not only to use every legitimate means to bring about a just conviction but to refrain from improper methods calculated to produce a wrongful conviction. In the case at bar, there was displayed from the outset of the trial on the prosecutor's counsel table three weapons; a .25 caliber pistol, a .38 caliber pistol and a shotgun.[1] Both pistols were received in evidence, but the shotgun was excluded. The general and accepted practice is not to display any exhibit until they are to be marked for identification. The display of three weapons before the taking of any evidence would appear to indicate to the jury that the defendant had been equipped with an arsenal. While too much fault may not be found as to the two pistols, the display of the shotgun carried connotations which should not have been present. A shotgun is more formidable looking, and increases apprehensions more than weapons such as pistols. There is the possibility that this long period of display of weaponry before the jury may have influenced their verdict.

II. DID THE RESISTANCE TO ARREST BY APPELLANT CONSTITUTE THREE VIOLATIONS OF TITLE 22, SECTION 505 (b) OF THE DISTRICT OF COLUMBIA CODE, 1967?

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[1] Trial Counsel for Appellant moved foraa mistrial on this point. [Tr. 18 of April 1, 1969] [Tr. 91, 98 of April 1 and 3, 1969].

Appellant was convicted on three counts of the indictment each of which charged an assault with a dangerous weapon on a police officer. All three counts arose from the single incident of resistance to arrest. The two counts involving Detective Fickling and Sergeant Davis appear to be the result of one shot fired by Appellant at them from the top of the stairs. [Tr. 80]. The count involving Officer Marlak was the dubious claim of his hat having been nicked by a bullet from Appellant's gun. [Tr. 79-84]. It is conceded that Appellant did resist arrest, and that the resistance was with a dangerous weapon against police officers. However, the question here presented is whether the number of officers involved in such an arrest determines the number of violations which may be charged in connection therewith. If there had been fifty officers involved, could there have been indictments and convictions on fifty separate counts?

In Fisher v. United States 231 F 2d 390, the Court said that doubt should be resolved against turning a single transaction into a multiple offense. In Blackburger v. United States 52 S. Ct. 180, 284 U.S. 299 the Court said that the test of identity of offenses is whether each separate statutory provision requires proof of additional fact which other does not. This was the test applied by the District of Columbia Court of Appeals in Hicks v. United States 234 A 2d 801. In Amer v. United States 367 F 2d 803, a Missouri case decided in 1966, the Court said that the test for determining whether there is identity of offenses within meaning of rule that several criminal offenses cannot be carved out of what is in fact one transaction is whether some evidence is required to sustain them.

In United States v. Johnson, 284 F Supp. 273, also a Missouri case decided in 1968, the court said test to be applied to determine whether there are two offenses or only one is whether proof of any additional fact not constituting an element of one of the offenses, is required to sustain conviction on the other.

A very old case involving multiple offenses is that of In Re Snow, 120 U.S. 274, 7S. Ct. 556 decided by the United States Supreme Court in the 1880's. The Act of March 22, 1882 (18 U.S. CA. 514) prohibited cohabitation by one man with more than one woman at the same time. Snow had seven wives, and was indicted and convicted on three counts of violation of the aforesaid act, and sentenced to consecutive sentences on each of the counts. There, the Court held that the offense of cohabitating with more than one woman was a continuous offense, and thus just one offense.

In this case, the incident at 1402 Ridge Place S. E. was a continuous exchange of gunfire between the police and Appellant. It was a single transaction involving resistance to arrest. Proof of assault on Sergeant Davis did not require proof of an additional fact as to the assault on Detective Fickling.

The count as to Officer Marlak also falls into the same category of the single transaction. However, the evidense as to this is highly questionable. There was no corroboration of his being shot at. If his hat had been nicked by a bullet, this was important physical evidence. Why was it ignored until trial? Why did he not include a description of this in his written report?

It would appear that in the case of a multiple count indictment

where there is a conviction on one count such as that on Detective Fickling, a momentum is created which carries along to succeeding identical counts. It follows, therefore, that if the Grand Jury had included additional counts involving other officers who were in the team at 1402 Ridge Place, there would have been conviction on those counts too.

III WAS IT PROPER FOR THE COURT TO IMPOSE CONSECUTIVE SENTENCES IN THE CIRCUMSTANCES OF THIS CASE?

If it be held that the assaults on the three police officers was a continuous offense arising out of a single transaction, the sentences as to these counts should have been concurrent. In that event, there was but one crime committed. In the case of Bryant v. United States No. 21, 863 decided in this jurisdiction on August 7, 1969, THIS Court held that the Court may not impose consecutive sentences for entering bank with intent to rob and robbing bank as the two offenses merge with completed robbery. In the case of Irby v. United States 390 F 2d 432, also in this jurisdiction, the Appellant pleaded guilty to housebreaking and robbery counts of a 9 count indictment and received consecutive sentences of 2-8 years on one and 4-12 on the other. In that case, amicus curiae was heard by the Court. Amicus concluded that the rule of lenity has a very limited utility, indeed as a touchstone of the propriety of consecutive sentences. He suggests that it be abandoned in favor of a supervisory rule to the effect that consecutive sentences may not be imposed for offenses arising out of a single course of conduct unless the sentencing judge (1) finds from the facts that the defendant was not motivated by a single intent and objective and (2)

recites his reasons for believing that consecutive sentences are necessary to achieve at least one of the recognized sentencing goals.

In the instant case there was but one course of conduct insofar as the counts relating to the assaults on the police officers are concerned. Therefore, it would appear that the imposition of consecutive sentences on counts two, four and six was not in accord with legal precedent.

CONCLUSION

For the foregoing reasons, the Appellant requests (1) that the Court consider whether the display of weapons on the counsel table of the prosecutor was of such a character as to prejudice the Jury in their consideration of the case.

(2) That the Court hold that the course of conduct of Appellant at 1402 Ridge Place S. E. was a single course of conduct, and that the sentences on counts two, four and six should be concurrent rather than consecutive.

Respectfully submitted,

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(3)

IN THE
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NO. 23, 167

UNITED STATES OF AMERICA, APPELLEE

v.

ROY D. LEWIS, APPELLANT

APPEAL FROM JUDGMENT OF THE
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APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

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Appeal from Judgment of the
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Argument

I. Appellant was prejudiced by the presence of three weapons on the counsel table during the course of the trial.

In appellant's brief, it is argued that the display of weapons on the Government counsel's table throughout the trial may have influenced the jury in arriving at their verdict. This is particularly true with respect to the shotgun which was properly not admitted into evidence. After reviewing the citations presented in the Government's brief, the display of the shotgun takes on a much greater significance.

In Bumper v. State of North Carolina, 391 U.S. 543, 88 S.Ct. 1788, the United States Supreme Court held that where a petitioner did not consent to the search and a rifle was admitted in evidence, it was constitutional

error. It further held that the rifle was plainly damaging evidence against the petitioner with respect to all three of the charges against him, and its admission at the trial was not harmless error.

In Macklin v. United States, 410 F.2d 1046, decided in this Court on March 25, 1969, the question of the harmful effect of the display of weapons before the jury not attributed to the appellant was before the Court. In that case weapons had been taken from the appellant's companions and were not charged to possession of appellant. It was held that whatever probative value this evidence might have was outweighed by its prejudicial effect. The conviction was reversed.

There can be no question that the display of the shotgun may have had some influence on the jury. It is impossible to ascertain the degree of such influence. However, the mere fact that the shotgun was there for the jury to see throughout the trial, indicates that it was a factor in the trial. Who can say that this did not sway the jury?

In Kotteakos v. United States, 66 S.Ct. 1239, 328 U.S. 750, it was held that if the Court cannot say that judgment was not substantially swayed by error, it must conclude that substantial rights were affected, and that error was not harmless. In that case, it was also held that if error is of such a character that its natural effect is to prejudice defendant's substantial rights, burden of sustaining verdict rests upon prosecution. At no

time has the Government in this case attempted to show that the display of the shotgun did not sway the jury.

In Dallago v. United States, No. 22,174, decided by this Court on November 7, 1969, a conviction was reversed where the jury inadvertently received documents not admitted in evidence and the Court could not conclude that appellant was not prejudiced thereby.

The Government, in support of its contention that the display of the shotgun did not influence the jury, cites Macklin v. United States (supra), Kotteakos v. United States (supra), and Dallago v. United States (supra). It is apparent that these cases can hardly be said to support that contention. In fact, the reverse of the position taken by the Government is presented by the very cases cited in the Government's brief.

In the light of the cases cited above, the question before the Court is not that the display of the shotgun before the jury did influence the jury. Rather, the question is could it have had an influence on the jury. If this latter question can be answered in the affirmative, the verdict of the District Court must be reversed, and the case remanded for a new trial on all counts.

II. Did the resistance to arrest by appellant constitute two violations of Title 22, Section 505(b) of the District of Columbia Code, 1967?

Inasmuch as the Government, in its brief, has confessed error with respect to one count, there now remains the question as to whether it

was proper to indict and convict on the remaining two counts of assault with a dangerous weapon on police officers. The question presented is, did the resistance to arrest by appellant constitute but one offense or can this one charge be divided into numerous counts, depending on how many officers were involved and how many shots were fired? In Bell v. United States, 75 S.Ct. 620, 349 U.S. 81, the Court held that where a defendant had been convicted of violation of the Mann Act on two counts for transporting two women at the same time, there was but one offense. It is appellant's position that there should have been only one count, or at the very least one one conviction and sentence, on this facet of the case.

Further, the conviction on the count as to Officer Marlak must be seriously questioned. Evidence as to whether there was an assault on Officer Marlak is so negligible as to raise doubts as to whether it occurred. Standing alone, it could not have resulted in a conviction. Officer Marlak claimed his hat was nicked by a bullet, but he failed to produce the hat. At the time he made his written report, he omitted mentioning this "assault." It is reasonable to assume that the only basis for a conviction on this count was the momentum created by the evidence, charge and conviction on the two counts involving Officers Fickling and Davis, as to which error has been partially confessed. 1/

1/ Appellant has urgently requested that two additional points be presented on his behalf --

(a) that the warrantless seizure and use at trial of the weapons found in the dwelling where appellant was arrested was constitutionally impermissible.

CONCLUSION

Appellant submits, upon the foregoing argument and authority, that his conviction must be reversed.

Respectfully submitted,

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1/ (continued)
Appellant asserts that the police were absolutely obligated to obtain both an arrest warrant and a search warrant, or at least a search warrant.

In support of this contention, see Chimel v. California, 395 U.S. 752 (1969) and Trupiano v. United States, 334 U.S. 699 (1948).

(b) that the Government was obligated to perform standard tests (e.g., fingerprints and ballistics tests) upon the evidentiary articles which it seized and retained and that, in the absence of such testing (with reports furnished to defendant's counsel) or of a showing that it was impossible or impractical to perform such tests, it was constitutionally impermissible to admit these articles into evidence. Testing may have served to exonerate the defendant.

In support of this contention, see Brady v. Maryland, 373 U.S. 83 (1963) and Campbell v. United States, 365 U.S. 85, 96 (1961).

And appellant strongly urged that the Court's attention be directed to its decisions in United States v. Dorman, No. 21,664, dec. May 5, 1969; United States v. Bush, No. 22,338, dec. August 15, 1969; and United States, v. Macklin, No. 21,945, dec. March 25, 1969; and United States v. Bryant, No. 21,863, dec. August 9, 1969.